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Supreme Court, U.S.
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No. 01-195

IN THE

# Supreme Court of the United States

VAN QUINTON LEAK,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals**

## REPLY OF THE PETITIONER

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## REPLY OF THE PETITIONER

1. The Solicitor General does not dispute that the lower courts are confused about whether, in order to prevail on a claim that a defendant's counsel of choice was denied, the defendant must show that his trial counsel was ineffective or that actual prejudice otherwise occurred. While the Solicitor General struggles to characterize the cases as "unclear," and "subject to more than one reading," Opp. at 12, it is plain that there is a split of authority on this issue. As set forth in the Petition, the Fifth Circuit noted this circuit split in 1978, and Chief Judge Posner recently recognized that it has persisted until today. Pet. at 9. After a quarter of a century, the circuit split is not going to resolve itself without this Court's intervention.

2. Moreover, the circuit split is so persistent because, in large part, it stems from the circuits' perceptions that the language in two of this Court's decisions is in conflict. On the one hand, numerous courts have followed the indication in *Flanagan v. United States*, 465 U.S. 259 (1984), that a showing of prejudice is not required where denial of counsel of choice is concerned, "since the right reflects constitutional protection of the defendant's free choice independent of the concern for the objective fairness of the proceeding." *Id.* at 268. While the Solicitor General notes that the Court ultimately did not address that precise question in *Flanagan*, Opp. at 10 n.2 (as Petitioner has conceded, Pet. at 16), the Solicitor General fails to confront the import of *Flanagan*. First, the suggestion of *Flanagan* is perfectly consistent with the course of this Court's jurisprudence, which rejects a requirement that prejudice be shown with regards to rights such as the right to counsel of choice. Pet. at 13-16. Moreover, dicta or not, numerous courts have cited the principles enunciated in *Flanagan* to support adherence to the majority position among the circuits. Pet. at 16.

Likewise, there is language in *Wheat v. United States*, 486 U.S. 153, 159 (1988), that—while clearly not addressing the issue here—has been read by the circuits to have placed this Court's imprimatur on the minority position that a showing of prejudice should be required where the right to counsel of choice is concerned. Pet. at 16-17. This Court should grant the Petition to clarify what the courts below have perceived to be conflicting authority from this Court, and to correct the minority circuits' erroneous rejection of this Court's jurisprudence in this area.

3. While the Solicitor General claims that this circuit split is not implicated by this case, the Solicitor General does not, and cannot, dispute that the court of appeals expressly considered whether "appellant's trial counsel was ineffective," Pet App. 9a, and went on to declare that the court should focus on the adversarial process and whether the defendant received effective assistance, Pet. App. 11a-12a n.8. In keeping with the minority position, it is plain that the court of appeals believed that the degree of prejudice to the defendant plays a role in determining whether the right to counsel of choice has been unconstitutionally infringed. This Court should resolve the circuit split and, at a minimum, remand this case to the lower court to purge the taint of its consideration of whether Petitioner received effective assistance.

4. The Solicitor General does not dispute that this is an important issue, dealing with an essential component of the right to counsel, that recurs frequently. This Court should resolve the issue for the benefit of the hundreds of defendants each year that face issues arising from their efforts to assert their right to counsel of choice.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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